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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TERRY LESLIE PICKENS, JR., Defendant and Appellant.	E056562 (Super.Ct.No. RIF1103411) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge, and J. Thompson Hanks, Judge (retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)[1] Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

[1] Judge Hanks presided over defendant's motion for discovery of officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531(*Pitchess*), while Judge Donner presided over defendant's trial.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Terry Leslie Pickens, Jr., was convicted of first degree burglary (Pen. Code,[2] § 459) and receiving stolen property (§ 496, subd. (a)). After waiving his right to trial on his priors, defendant admitted that he suffered (1) a prior felony conviction for first degree burglary that constituted both a prior serious felony (§ 667, subd. (a)(1)) and a prior strike conviction (§§ 667, subd. (c) & (e)(1), 1170.12, subd. (c)(1)), and (2) four prior prison terms (§ 667.5, subd. (b)). He appeals, contending the trial court (1) abused its discretion in summarily denying his *Pitchess* motion; (2) erred in admitting evidence of his prior burglary pursuant to Evidence Code section 1101, subdivision (b); and (3) erred in denying his motion for new trial.

I. FACTS

A. The Prosecution's Case

On July 8, 2011, at approximately 1:30 p.m., Patrol Officer Lori Blaszak of the Riverside Police Department was the first officer to arrive at a burglary in progress at 3198 Locust Street in Riverside. A neighbor had called the police reporting she saw a man wearing a light blue shirt and dark pants, climbing in through a window on the side of the house.

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[2] All statutory references are to the Penal Code unless indicated otherwise.

Officer Blaszak testified that she went to a neighbor's yard north of the house to get a look at the window described by the witness. She stood behind a tree and looked over the fence into the window, which was open and had no screen because the screen was on the ground. From about 25 to 30 feet away and with nothing blocking her view, the officer saw "a light-skinned [B]lack male [in his early 40's] wearing a light gray tank top shirt and short haircut" standing "square in front of the window facing straight out." She identified the male as defendant. As soon as defendant saw her, he closed the window. She then heard "door noises," like a door opening or slamming, from the back of the house. She got her radio and put out a description of the perpetrator as "[l]ight-skinned [B]lack male, 40's, short . . . almost shaved haircut wearing light gray tank top." Knowing that other officers were already responding, she stayed at the house in case anyone else was inside.

When Officer David Lim arrived on the scene, Officer Blaszak was positioned near the northwest corner of the house peeking over a fence. Officer Lim also heard her yelling at someone and heard what "sounded like a door opening." Officer Lim ran toward the rear of the house. On Second Street, close to Brockton Avenue, Officer Lim saw defendant, who was wearing a gray tank top and dark-colored shorts, come out of the driveway of 4143 Second Street. Defendant saw the officer and ran in a different direction, disregarding Officer Lim's orders to stop. The officer eventually caught defendant and placed him in handcuffs.

Officer Grant Linhart arrived just as Officer Lim was taking defendant into custody. Defendant's pockets were bulging, and contained a "baseball-size wad" of jewelry, cash, two checkbooks, SanDisk memory cards, a cell phone, "something on a lanyard," and gift cards. The police set up a perimeter and a canine unit, and air support arrived to search for a possible second suspect.

Kathleen Hoffman and Dong Mi Lee were living in the burglarized house. When they left earlier that day, the doors were locked. When Hoffman returned home, the house was in disarray and several things were missing. At the police station, the items found in defendant's pockets were identified as belonging to either Hoffman or Lee. Neither Hoffman nor Lee knew defendant, and neither had given him permission to take any items from their home.

B. The Defense

The 911 call was played for the jury. A transcript of the call was also provided to the jury. The caller described the perpetrator as having dark hair and wearing a light blue shirt and dark pants. When asked if the person was White, Black, or Hispanic, the caller was not sure, but that the man was probably "more Hispanic." The caller described him as looking like a "teenager mid twenties." The caller stayed on the phone and reported that a female officer had arrived on the scene, had her gun out, and had seen the open window. Officer Blaszak testified that because the initial report of a Hispanic male wearing a blue shirt and dark pants did not match defendant's description, the officers set up a perimeter and requested the canine unit to see if they could find a second suspect.

About an hour after the initial radio call, a second suspect, a Hispanic male with the last name Aguayo, was arrested about half a mile from the victims' house. He was dressed similarly to defendant, wearing a light blue shirt and dark colored shorts. His photograph was shown to the witnesses at trial, published to the jury, and admitted into evidence. Aguayo did not have any of the victims' property on his person when he was arrested.

Officer Christie Arnold transferred the 911 caller to defendant's location and to Aguayo's location. The caller was not sure if defendant was the perpetrator; however, she identified Aguayo as the person she saw climbing through the neighbor's window. Officer Blaszak testified that Aguayo and defendant were dressed similarly that day. Both had on light colored shirts (one light gray and one light blue) and dark shorts, both were lighter skinned with similar haircuts and physical appearances.

II. DENIAL OF *PITCHESS* MOTION

Defendant filed a motion for discovery of the personnel records of Officer Lori Blaszak, the officer who saw him inside the home that was being burglarized. He asserted that the officer's personnel records were discoverable under Evidence Code section 1045. The trial court denied the motion after finding insufficient "information . . . to warrant a *Pitchess* motion." On appeal, defendant contends, "the trial court abused its discretion by summarily denying [his *Pitchess*] motion and not holding an in camera hearing to review the requested officer personnel records."

A. Standard of Review

The pertinent legal principles are well settled. A criminal defendant is entitled to discovery of a police officer's confidential personnel records if those files contain information that is potentially relevant to the defense. (*Pitchess*, *supra*, 11 Cal.3d at pp. 537-538; Evid. Code, §§ 1043-1045.) To obtain discovery, the defendant must file a motion, supported by affidavits, "showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . ." (Evid. Code, § 1043, subd. (b)(3).) If good cause is shown, the trial court then reviews the records in camera to determine if any of them are relevant to the proposed defense. (Evid. Code, § 1045, subd. (b).)

The good cause showing that triggers the trial court's in-chambers review is "relatively low." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.) The defendant must present a specific factual scenario of officer misconduct that is plausible, i.e., one that could or might have occurred. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019.) The defendant must also demonstrate how the discovery would support the defense or how it would impeach the officer's version of events. Because the information discoverable under a *Pitchess* motion is limited to "instances of officer misconduct related to the misconduct asserted by the defendant," (*Warrick*, *supra*, at p. 1021) the defendant must also specifically describe that misconduct. On appeal, we review a trial court's ruling on a *Pitchess* motion for abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

B. Analysis

In this case, defense counsel offered the following factual scenario to support defendant's *Pitchess* motion: (1) Officer Blaszak did not see defendant in the residence, because (2) "[t]he facts support it would be difficult, if not impossible, to positively identify a person, in a bathroom from the front yard, through a side window, behind a five[-]foot fence, when the named officer is only 5'8"; (3) "[n]o other witness claims to have seen [d]efendant in the residence"; and (4) "[a] co-defendant matching the 911 call description was charged, but the case was dismissed." In short, defendant's factual scenario is that because Officer Blaszak could not have seen him inside the residence, she must be falsely stating that she did, fabricating the charges and or the evidence. However, is this factual scenario plausible?

To determine plausibility, i.e., whether the scenario could have or might have occurred, we look to the evidence defendant submitted to support his claim. As the People note, defendant's factual scenario was plausible only until we consider the fact that he was apprehended by a different officer as he ran away from the burglarized residence; he never denied being in possession of the victims' property; and he never denied being inside their home. Rather, according to the record, he admitted to the police officers that he had taken certain items found in his pocket (which were later identified as belonging to the victims) and that "his friend that he was with" was last seen on the porch of the victims' home. Although these statements to the police were subsequently

suppressed on the grounds that they violated *Miranda*,[3] defendant never objected to the trial court considering them in deciding the merits of his *Pitchess* motion. Furthermore, on appeal, he acknowledges such statements and notes were subsequently suppressed; however, he does not object to this court considering them. The trial court agreed with the People's opposition and found that defendant had alleged insufficient information to warrant a *Pitchess* motion.

We agree with the trial court that the evidence does not support, and in fact refutes, defendant's scenario that Officer Blaszak lacked veracity, falsely arrested defendant, fabricated the charges and/or evidence, was dishonest or engaged in improper tactics.[4] From the record before this court, Officer Blaszak saw defendant through the open window to the residence. When defendant saw the officer, he closed the window and immediately exited the house. Shortly thereafter, he was apprehended by another officer. He was dressed like and looked similar to the suspect identified by the 911 caller. In short, we know from the evidence that defendant's scenario is not plausible. Therefore, the trial court did not abuse its discretion when it denied defendant's *Pitchess* motion based on defendant's failure to establish good cause for the requested discovery.

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[4] In his reply brief, defendant submits this court should not consider Blaszak's trial testimony regarding her broadcast description of defendant in determining the propriety of the trial court's denial of the *Pitchess* motion. In reaching our decision, we have not done so.

III. EVIDENCE CODE SECTION 1101, SUBDIVISION (b)

Defendant contends the trial court erred in admitting evidence of his 1997 residential burglary[5] under Evidence Code section 1101, subdivision (b), for the purpose of deciding whether he had acted with the intent, had a motive, and had a plan or scheme to commit the alleged offense. He argues the only issue at trial was identity of the perpetrator. Furthermore, defendant faults the court for failing to conduct an Evidence Code section 352 analysis.

A. Standard of Review

We review a trial court's decision regarding admission of evidence of uncharged crimes for abuse of discretion. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) A proper exercise of discretion is "'neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of a person's character to prove a person's conduct on a specified occasion. However,

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[5] On March 21, 1997, Riverside Police Officer Michael Medici was dispatched to a burglary call in progress at 11327 Turningbend in Riverside. He arrived at approximately 1:20 p.m., observed defendant, and stopped him from leaving in his car. The officer read defendant his *Miranda* rights, and after waiving them, defendant admitted he had just entered the home through a window and stolen property that he was carrying in two pillowcases.

evidence of uncharged acts committed by the defendant is admissible to prove some other fact, such as identity, common design or plan, knowledge, intent, motive, opportunity, or absence of mistake or accident. (Evid. Code, § 1101, subd. (b).) Here, the prosecution offered evidence to show that (1) defendant's motive and intent were to enter the victims' house and steal; (2) he had a common scheme of entering the residence during the middle of the day, using the same method of entry by climbing through a window on the side or rear of the house; and (3) he knew that he was committing a residential burglary.

"Evidence that involves crimes other than those for which a defendant is being tried is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense. [Citations.] We have held that to be admitted, evidence of other crimes must be relevant to some material fact at issue, must have a tendency to prove that fact, and must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]" (*People v. Thompson* (1988) 45 Cal.3d 86, 109.)

"We review the admission of evidence under Evidence Code section 1101 for an abuse of discretion. [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 864.)

B. Analysis

In *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991, our state's highest court discussed the different purposes for which prior acts may be admitted and

the various degrees of similarity to the current charge required. *Ewoldt* specifically explained that "[e]vidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation]" (*Ewoldt*, *supra*, at p. 394, fn. 2, italics in original.) Thus, in deciding whether or not to admit the evidence, the court was allowed to assume that defendant was present at the scene and that he committed the act alleged, regardless of the defense. Similarly, the prosecution was allowed to assume and argue that if defendant committed the charged act, he did so with the requisite intent**.** (*Ibid*.)

Ewoldt further explained that "[e]vidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged." (*Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2, italics in original.) The Court gave the following example: "[I]n a prosecution for shoplifting in which it *was* conceded or *assumed that the defendant was present at the scene* of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution." (*Ibid.*, italics added.) Thus, again, regardless of the defense, the court was allowed to assume that defendant was present at the scene.

Nonetheless, according to defendant, when the identity of the perpetrator is in dispute, the court cannot admit evidence of a prior act to prove intent or common plan.

According to defendant, the defense did not contend the burglar did not have intent to steal. Rather, defendant argued that "another man was the actual burglar." Thus, defendant argues that "the jury was not tasked with determining the *intent* of the burglar in the home—they essentially only had to decide his *identity*." Since the only issue in dispute was identity, defendant maintains that the court erred in admitting evidence of the prior act to prove intent and common scheme. In most prosecutions for burglary, the main issue to be decided is "whether the defendant was the perpetrator of that crime." (*Ewoldt*, *supra*, 7 Cal.4th at p. 406.) As asserted by defendant, the primary issue in the instant case was the identity of the perpetrator. However, defendant's plea of not guilty put all the elements of the crime in issue for the purpose of deciding the admissibility of evidence of prior acts. (*Id*. at p. 400, fn. 4.) And, the People's "'burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" (*Ibid*.) Accordingly, the court did not abuse its discretion in admitting evidence of the prior burglary for the reason asserted by defendant.

C. Evidence Code Section 352 Analysis

Notwithstanding the above, evidence of prior acts that is admissible to show intent, motive, or common plan or scheme, may be excluded if its probative value is substantially outweighed by the probability that its admission will require undue consumption of time or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.) Prejudice in this context is not the

prejudice or damage to a defense that naturally flows from probative evidence; rather, it is evidence that "'"uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*."'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

As stated in *Ewoldt*, "[i]n many cases the prejudicial effect of [evidence of a defendant's similar acts] would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute. [Citation.]" (*Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406.) The court explained as follows: "[I]n most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be *inadmissible.* Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, *if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative* and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value." (*Id*. at p. 406, italics added.) Such was the case here. Thus, the court erred in admitting the evidence for purposes of showing common plan or scheme.

Any error in admitting the prior misconduct evidence was harmless. "[T]he erroneous admission of prior misconduct evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. [Citations.]" (*People v. Scheer*, *supra*, 68 Cal.App.4th at pp. 1018-1019.)

Here, there was sufficient evidence to support defendant's conviction, aside from the evidence of the uncharged misconduct. As stated by defendant, the only real issue was the identity of the burglar. The evidence showed that Officer Blaszak saw defendant inside the residence. Defendant was caught by Officer Lim running away from the residence. Items taken from the residence were found in defendant's pocket. While there was another male Hispanic who fit the description of defendant and was wearing similar clothing, defendant was the one with the stolen property in his pockets. Thus, it is not reasonably probable that a verdict more favorable to the defendant would have resulted if the evidence of the uncharged misconduct was excluded.

IV. MOTION FOR NEW TRIAL

Defendant contends the trial court abused its discretion when it denied his motion for new trial based upon the alleged ineffective assistance of trial counsel who inadvertently removed Exhibit H-1 (Aguayo's photograph) from the courtroom during jury deliberations.

A. Further Background Facts

Following defendant's arrest, the officers continued searching for a second suspect, presumably because defendant said he had a friend whom he had last seen on the victims' porch, and because the 911 caller had described the suspect she had seen entering the window as a Hispanic male. Eventually, a Hispanic male with the last name Aguayo was arrested about a half a mile from the victims' house. The 911 caller identified Aguayo as the man she had seen climbing through the window. Aguayo's photograph (Exh. H-1) was shown to the witnesses at trial, published to the jury, admitted into evidence, and argued by defense counsel during closing argument.

The jury was instructed with CALCRIM No. 104, which, in relevant part, provides: "You must decide what the facts are in this case. You must use only the evidence that is presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence." The jurors were also told, "During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. These exhibits will be sent into the jury room with you when you begin to deliberate." (CALCRIM No. 3550.)

During deliberations, the jurors requested the transcripts of the 911 call. The trial court called in the jury and stated: "As I indicated to you several times, the transcripts are not evidence. They will never be evidence in the case. They are not admitted. And, once again, to remind you, the reason is it is what you hear, not what you read, that is

evidence. So you have the CD back there. You can play it. And I understand you have a machine that is being made available to you. It will be brought back to play it.

"But the reason is is transcripts are not always accurate, and so the transcript is not evidence. It is what you hear, not what you read. That's why we select them. And, again, I gave this admonition several times. But I'm happy to remind you of it because you listened to a lot of different things, and it's something you could have easily forgotten. Does that answer your question.

"TJ06: Yes.

"THE COURT: Yes, sir.

"TJ03: Another question. So are there audio recordings of the radio calls that were made during that time other than the 911 call?

"THE COURT: The only evidence that was admitted in this case is the evidence that is back in the jury room with you. And there's a period at the end of that. It is only the evidence that was presented in this trial that you're to consider. You're not to speculate whether there is other evidence out there, whether there could have been other evidence.

"But, as you remember, there is an instruction that the attorneys need not produce all evidence that's available. So only the evidence that is back there in the deliberation room with you, the evidence that I allowed in, along with the stipulation, is the evidence you consider, okay."

After trial, defense counsel explained to the court that he had inadvertently removed Exhibit H-1 from the courtroom, and that it had not gone into the jury deliberation room. The court appointed new counsel to prepare a motion for new trial.

Prior to sentencing, defendant's newly appointed counsel filed a motion for new trial on three separate grounds; however, only one ground is discussed on appeal, namely, ineffective assistance of counsel. Defendant claimed he was denied the effective assistance of counsel by the inadvertent removal of Exhibit H-1 from the courtroom. His trial counsel submitted a declaration stating his belief that he mistakenly placed the exhibit with his Power Point slides after closing argument, and thus, took it with him to his office. In opposing the motion, the prosecutor conceded that trial counsel had performed deficiently; however, she argued that defendant had "simply failed to demonstrate prejudice from the failure of the jury to have exhibit H-1 during deliberations." She noted that defense counsel showed Exhibit H-1 to the jury "for several minutes," and the jury never asked to see it again during deliberations. Moreover, she argued the People never disputed that the 911 caller identified Aguayo as the person the caller saw climbing through a neighbor's window, and there is nothing in the 911 call that prevented a finding that defendant also entered the residence and was inside when the officers arrived.

The trial court denied the motion for new trial, stating: "I don't believe [defense counsel's inadvertent taking of Exhibit H-1] prejudiced [defendant's] case because it was stipulated that there was a Hispanic man, and the jury had seen that photo many times.

[¶] Also, the jury instructions with respect to exhibits, the Court is permitted to not even send exhibits back and have the jurors ask for exhibits that they wish to see. That's one of the options in CALCRIM with respect to exhibits. And of course, the jury never asked for that in this case."

B. Standard of Review

"[I]neffective assistance of counsel is not among the nine grounds for ordering a new trial set forth in Penal Code section 1181, but our Supreme Court has made clear that 'the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law,' and that in appropriate circumstances 'the issue of counsel's effectiveness [may be presented] to the trial court as the basis of a motion for new trial.' [Citation.]" (*In re Edward S.* (2009) 173 Cal.App.4th 387, 398, fn. 3.)

"The standard for establishing ineffective assistance of counsel is well settled. A defendant must demonstrate that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant. [Citation.] A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

"In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny," and "view and assess the reasonableness of

counsel's acts or omissions . . . under the circumstances as they stood at the time . . . ." (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

C. Analysis

Clearly, defense counsel was deficient in taking Exhibit H-1 from the courtroom. Thus, we must consider whether defendant was prejudiced by the deficient representation, i.e., was there a reasonable probability that, but for counsel's failings, defendant would have obtained a more favorable result? We conclude that there was not. When asked if the person climbing through her neighbor's window was White, Black, or Hispanic, the 911 caller said she was not sure, but that he was probably "more Hispanic." Later, she identified Aguayo as the man she saw climbing through the window. The jury had seen the picture of Aguayo many times throughout the trial. There was no issue that Aguayo was the Hispanic male who looked similar to defendant, was found within a half a mile from the victims' residence, and was identified by the 911 caller. Regardless of the picture of Aguayo, the jury heard extensive testimony about a second suspect who looked similar to defendant. Because the jurors never asked to see Exhibit H-1, the picture was not needed for the jury to reach its decision.

Notwithstanding the above, defendant contends the trial court precluded the jury from requesting Exhibit H-1 because the judge told them the only evidence they could consider was already back in the jury deliberation room with them. "So only the

evidence that is back there in the deliberation room with you, the evidence that I allowed in, along with the stipulation, is the evidence you consider, okay." However, those words were made in response to the jury's request to obtain a copy of the transcript of the 911 call. By referencing these words in support of this issue defendant is using them out of context. [6]

Because defendant failed to establish that he was prejudiced by counsel's actions, the trial court properly denied his motion for new trial.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.

[6] According to defendant, "[b]y following the court's instructions, the jury would have excluded the photograph of Aguayo from its consideration. It is also reasonable to infer that the jury, upon finding the photograph missing, would have then disregarded the descriptions and arguments associated with it." We reject such suggestion as amounting to nothing more than mere speculation. The jurors were told that they "alone must judge the credibility or believability of the witnesses, and that the "testimony of only one witness can prove any fact." Defendant was identified by Officer Blaszak and caught by Officer Lim with the victims' property in his pants pocket. According to the verdict, the jury chose to believe Officer Blaszak's testimony that she saw defendant in the victims' residence.